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OCTOBER TERM, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellant,

—v.—

CHAN KENDRICK, ET AL.,
Appellees.

Caption continued on Inside Front Cover

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., AND NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS

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UNITED FAMILIES OF AMERICA,

Appellant,

—v.—

CHAN KENDRICK, ET AL.,

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INTERESTS OF AMICI CURIAE

The American Public Health Association ("APHA") is a national organization devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is now the largest public health organization in the world, with over 50,000 members, including 51 state and local affiliate organizations. The APHA represents all disciplines and specialties in public health, including consumers and health professionals such as physicians, nurses, health educators, and family planning specialists. APHA members seek to develop health policy that ensures equitable and quality health care for all, including pregnant and sexually active adolescents. The APHA has a particular interest in the Court's resolution of this case because the challenged Adolescent Family Life Act contradicts numerous APHA policy statements, including those supporting accurate public information on abortion (No. 8524), the right to informed consent (No. 7839), and counseling on all contraceptive methods in family planning programs (No. 8304).

The American Psychological Association ("APA"), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees in the United States. APA's purposes are to advance psychology as a science and profession, and to promote human welfare. A central function of APA is to establish ethical standards and guidelines for the delivery of psychological services, including counseling on reproductive options. The Ethical Principles of Psychologists have been incorporated in the laws of most states, thus governing the professional conduct of psychologists licensed in those states.

Planned Parenthood Federation of America, Inc. ("PPFA"), organized in 1922, is the leading voluntary public health organization in the field of family planning. PPFA's 181 affiliates in 43 states operate over 700 family planning clinics offering services to the public. Most affiliates offer medical

services and 48 include abortion services as part of their program. Most affiliates that do not perform abortions offer pregnancy counseling and referral. All affiliates offer educational and informational services in voluntary fertility control. PPFA opposes restrictions on the accessibility of reproductive information and services because such restrictions are contrary to the public health and welfare. The adverse impact of an unwanted pregnancy is particularly acute for the adolescent because an early pregnancy entails substantial medical risks and often significantly limits her educational and career opportunities.

The National Family Planning and Reproductive Health Association, Inc. ("NFPRHA") is concerned with the improvement and expansion of family planning and reproductive health care services throughout the United States. Among NFPRHA's 900 members are consumers and health care professionals, including State, county and city health departments, Planned Parenthood Federation of America affiliates, hospital-based clinics, "umbrella" family planning councils, independent, free-standing family planning clinics and other family planning organizations and providers. Many of NFPRHA's members have sought AFLA funds and been denied because they refuse to abide by the anti-abortion and parental consent provisions. Other members have not even applied for AFLA funding, despite clear capabilities to deliver services under the Act, because they feared or were told that they had no chance of receiving funding on account of their objections to the anti-abortion and parental consent provisions.

This case raises issues concerning limits on the information that may be communicated to adolescents who are or may become sexually active, or pregnant. Many of the members of amici have conducted research on effective and ethical education for adolescents on sexuality, family planning, pregnancy, and abortion. The issues raised are of particular interest to amici because of their commitment to public health and their expertise in reproductive health education and counseling.

This brief is filed pursuant to Rule 36.2 of the Rules of the Court. The parties have consented to its submission in letters on file with the Clerk of the Court.

INTRODUCTORY STATEMENT

Amici urge affirmance of the district court's finding that the Adolescent Family Life Act. 42 U.S.C. § 300z *et seq.* [hereinafter AFLA or the Act] is unconstitutional insofar as it requires the participation of religious organizations in AFLA programs. In addition, amici suggest that the statute presents such constitutionally sensitive questions as whether the AFLA is consistent, on its face and as applied, with the constitutional right to make reproductive decisions free from government interference.

When it enacted the AFLA, Congress recognized the manifold problems of adolescent pregnancy. The Act recites that pregnant adolescents experience:

> a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher infant mortality and morbidity; a greater likelihood that an adolescent marriage will end in divorce; a decreased likelihood of completing schooling and higher risks of unemployment and welfare dependency. . . .

42 U.S.C. § 300z(a)(5). Unfortunately, Congress ignored these real concerns of adolescent pregnancy and childbirth and instead enacted a law which is not only medically unsubstantiated but violates the fundamental constitutional rights of pregnant adolescents.

The AFLA was enacted to serve several purposes:

> (1) finding effective means, within the context of the family, of reaching adolescents before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family members, and to promote self discipline and other pru-

> dent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy;
>
> (2) promoting adoption as an alternative for adolescent parents;
>
> (3) establishing innovative, comprehensive and integrated approaches to the delivery of care services for pregnant adolescents;
>
> (4) supporting research and dissemination of research results on the causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy and childrearing.

42 U.S.C. § 300z(b).

To meet the purposes of the AFLA, grants are made to public and nonprofit organizations to fund "prevention services" for the prevention of premarital adolescent sexual relations and "care services" for the provision of care to pregnant adolescents and adolescent parents. 42 U.S.C. § 300z(1)(a) 7 & 8. Among the applicants' specific obligations under the AFLA is the involvement of religious organizations in the provision of services.[1] The merit of each grant application is judged on how

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1 Section 300z-5(a)(21)(B) requires that applicants provide

> a description of how the applicant will, as appropriate in the provision of services . . . involve *religious and charitable organizations*, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives (emphasis added).

The Committee Report accompanying the bill passed to extend the AFLA explains:

> "Current law *requires* applicants to involve religious and charitable organizations . . . in the development of projects and in the delivery of services."

Committee on Labor and Human Resources, The Adolescent Family Life Act, S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984) (emphasis added).

effectively the applicant demonstrates the involvement of religious organizations.[2]

In conjunction with its mandate to involve religious organizations, the AFLA prohibits the delivery of information on abortion.[3] The only exception to the abortion prohibition is a provision that pregnant adolescents may receive referral for abortion counseling if both the "adolescent and the parents or guardians of such adolescent request such referral." 42 U.S.C. § 300z-10. While banning information on abortion, the Act instructs grantees to provide adolescents information about adoption. 42 U.S.C. § 300z-1(a)(4)(B) & (G)(i).

Only programs that provide biased and incomplete information about the options available to pregnant adolescents are funded by the Act. The AFLA thus not only violates the

2 Reviewers of grant applications emphasized religious involvement in their evaluations of the strengths and weaknesses of applicants' proposals. They found, for example, that the "biggest weakness" of San Diego University Foundation's application was "no discussion of moral values or spiritual development. . . . No research plan to do . . . 'church attendance' level assessment of previous and post-intervention level of moral and spiritual development on activity rate." Similarly, Baltimore City's application was criticized for "[l]acking . . . the kind of counseling that you get in Catholic Social Services." Another reviewer noted that "[n]o experts on transcendental (the most effective) Judeo-Christian values is represented in the development or teaching of this proposal." JA at 509-511.

Summaries prepared to explain why applicants were rejected also focused on the absence of religious involvement. Lake Cumberland District Health Department was found lacking because it "promised no involvement of religious groups." R. 155, App. Vol. IA, 505-D. Junior Education of Tomorrow was criticized for not providing "evidence that local churches or pastoral help and training will be used." *Id.* at 505-E. The Family Health Foundation of Alviso, California failed to demonstrate "inclusion of religious/charitable organizations." *Id.* at 505-F.

3 Section 300z-10(a) requires that:

> Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral . . .; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

constitutional rights of pregnant adolescents but has profound negative consequences for adolescent health.

Summary of Argument

This Court has repeatedly recognized that the government may not interfere with the constitutionally protected right to make procreative decisions by dictating the contours of the dialogue between a woman and her health care providers. By requiring the involvement of religious organizations and prohibiting any discussion of abortion, the AFLA manipulates impermissibly the provision of information about prudent approaches to adolescent sexuality and pregnancy, and thus violates this right.

Although one of the stated purposes of the AFLA is to encourage and provide for the dissemination of information about adolescent sexuality and pregnancy, the Act prevents physicians and other health care professionals from providing accurate information about the physical and psychological risks of various procreative options, including abortion. In this respect the AFLA requires deviation from accepted professional standards. In fact, only full discussion of factual information about the entire range of reproductive and contraceptive options permits a constitutional free choice and enhances development of responsible adolescent decision-making about sexuality and childbirth.

By requiring grantees to involve religious organizations in sex education and pregnancy counseling and, at the same time, prohibiting those grantees from communicating information about abortion, the AFLA grants preferences to those religions that teach the impermissibility of abortion. Moreover, the government, having opened a channel for communication about adolescent pregnancy, may not, consistent with the First Amendment, discriminate among the options that may be communicated. No compelling government interest can be offered sufficient to justify the AFLA's favoring either certain religions or certain viewpoints about abortion over others.

I. THE ADOLESCENT FAMILY LIFE ACT IMPERMISSIBLY INTERFERES WITH AN ADOLESCENT'S CONSTITUTIONAL RIGHT TO MAKE INFORMED REPRODUCTIVE DECISIONS.

A. The AFLA Compels Grantees to Provide Distorted Information in Violation of a Woman's Fundamental Constitutional Right to Make an Informed Reproductive Choice Free of Government Coercion.

This Court has held that "the right of privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 419 (1983). Moreover, this Court has repeatedly protected women's right to decide by rejecting states' attempts to interfere with a woman's decision-making process. It has taken a particularly harsh view of state efforts to insinuate itself into the decision-making process by controlling the content of the patient-physician relationship.

In *Akron*, for example, the Court struck down an ordinance requiring physicians to furnish pregnant women contemplating abortion with certain specific information, some of which was misleading. The Court held that this requirement was an unconstitutional attempt by the state "to influence the woman's informed choice between abortion and childbirth." 462 U.S. 416, 447. Again, in *Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, 106 S.Ct. 2169 (1986), the Court rejected Pennsylvania's attempt to insert itself into the "privacy of the informed-consent dialogue between the woman and her physician" by requiring physicians to convey specified information to their patients. 106 S.Ct. at 2179.

The Court found the Akron and Pennsylvania laws constitutionally defective for two reasons. First, they required physicians to convey information that was designed to influence a woman's choice between abortion and childbirth. Second, they placed a "straitjacket" on the informed-consent dialogue between a woman and her physician.[4] *Thornburgh*, 106 S.Ct. at 2179 (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

The two reasons that this Court articulated for invalidating the laws at issue in *Thornburgh* and *Akron* apply with equal force to the AFLA. First, the Act delivers pregnant adolescents misinformation by requiring doctors or other experts to omit critical facts about abortion alternatives when counseling them on pregnancy; like the information provided in *Akron* and *Thornburgh*, these omissions are obviously designed to deter adolescents from choosing abortion. Second, it "straitjackets" physicians and health care professionals, requiring them to reject accepted medical practice, the guidelines promulgated by their professions, and the health interests of their patients.[5]

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4 This Court's decisions in *Maher v. Roe* and *Harris v. McRae* do not validate the kind of active state interference with a woman's reproductive choice that the AFLA represents. *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). *Maher* and *Harris* stand for the proposition that, while a woman has a right to choose an abortion, she does not have a right to compel the state to pay for the abortion simply because it has chosen to pay for childbirth. Central to these decisions was the fact that the women affected were no less able to exercise their constitutional right under the challenged funding scheme than if the government had provided no benefits at all.

The AFLA, however, does more than passively refuse to subsidize abortions or programs that encourage abortions. It invades the realm of privacy protected by this Court—the *process of deciding* whether to bear a child. By funding programs that provide pregnancy counseling so long as they deliver no information about abortion, the Act requires the transmission of incomplete and misleading information to pregnant women. It thereby precludes them from exercising a knowing and intelligent bearing choice. *Akron* and *Thornburgh* demonstrate that the government's efforts in the AFLA to manipulate a woman's reproductive choice by controlling the content of the patient-physician dialogue are unconstitutional.

5 Although most cases concerning abortion counseling deal with licensed physicians, the principles underlying those decisions apply to the consultative programs subsidized by the AFLA. Doctors in hospitals or clinics funded under the Act are subject to its restrictions. Moreover, even when counseling is conducted by non-physicians, the services provided are

1. The AFLA Both Intrudes on the Discretion of Health Professionals and Distorts Information Given to Pregnant Adolescents in Order to Deter Them From Choosing Abortion

The AFLA requires physicians and other health professionals in funded programs to withhold customary and relevant medical information to pregnant adolescents in their care. A governmental proscription on the provision of abortion information intrudes on the discretion of health care providers and interferes with a woman's procreative choice as effectively as a state requirement that certain kinds of information be provided.

One way in which the Act "straitjackets" counselors and misleads adolescents in their care is by forbidding full disclosure of the relative risks and options to an adolescent, who, for health reasons, should avoid childbirth. For example, a pregnancy counselor who is funded under the Act cannot inform an adolescent who suffers from chronic renal disease that she is at increased risk of morbidity and mortality unless she chooses to terminate the pregnancy.[6] Similarly, adolescents afflicted with cancer, diabetes, heart problems, sickle cell anemia, and hypertension cannot be informed by their physicians that abortion may be medically indicated. JA 527-528.

In addition, an adolescent who tests positive for antibodies to the AIDS virus will not receive the information she needs to make an informed procreative choice. A woman who tests

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functionally identical to those provided within a doctor-patient relationship. *See Akron*, 462 U.S. at 448 (recognizing the similarity between abortion counseling by physicians and other qualified professionals and holding that a state may not require that counseling be conducted by physicians). It would be illogical to allow the government to intrude on the dialogue between a woman and her health counselor merely because the woman is being advised by a non-physician.

6 *See* Kreuter & Hollingsworth, *Adolescent Obstetrics and Gynecology* 192-93 (1978).

positive may be more likely to develop AIDS Related Complex ("ARC") or AIDS if she carries a pregnancy to term. Thus, termination of the pregnancy may reduce the risk of AIDS or ARC to the adolescent. Moreover, approximately one-third to one-half of the infants born to AIDS-infected mothers will also be infected with the AIDS virus[7] and, because there is no known treatment to prevent fetal transmission, abortion is the only way to avoid the heartbreak and trauma of giving birth to an infant with AIDS. Thus, morbidity and mortality may result from the AFLA's prohibition on abortion counseling in such cases.

The AFLA's prohibition on abortion information also hampers the ability of physicians and counselors to provide genetic counseling. Any responsible counseling in the area of genetic diseases, where the condition is detectable prenatally, requires discussion of abortion.[8] For example, at the time a patient receives health care, tests or her medical history may reveal that she is at increased risk of giving birth to a child with a genetic disability such as Sickle Cell Anemia or Tay Sachs

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7 United States Department of Health and Human Services, *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 20-21 (1987). The American College of Obstetricians and Gynecologists also states that women with antibodies to the AIDS virus "must" be counseled that if they become pregnant, the pregnancy may precipitate illness and that women infected with the AIDS virus "must understand that the probability is 20-50% that they will transmit infection perinatally to their fetus or newborn. . . . Those who do become pregnant should be counseled again about the risks to themselves and their child and should be informed about the option of pregnancy termination." ACOG Committee on Obstetrics: Maternal and Fetal Medicine and Gynecologic Practice, *Prevention of Human Immune Deficiency Virus Infection and Acquired Immune Deficiency Syndrome*, June 1987.

8 *See* Fletcher, Berg & Tranoy, *Ethical Aspects of Medical Genetics*, 27 Clinical Genetics 199, 201 (1985); and Powledge & Fletcher, *Guidelines For Ethical, Social, and Legal Issues in Prenatal Diagnosis*, 300 New England J. Med. 168, 169 (1979) (the genetic counselor, out of respect for patient autonomy, should provide complete information on various options, including abortion).

disease. She will, of course, want and need to know what options are available to her to make an informed choice for herself between abortion and carrying the pregnancy to term. The AFLA prevents a physician from informing the patient of the availability of amniocentesis to test her fetus for genetic disability, and the option of abortion if the fetus is diagnosed with such a disability. As a result, she too is compelled to make her procreative choice on the basis of misleading information.

The AFLA would also bar full disclosure of the relative risks and options to an adolescent who, for health reasons, wishes to consider alternative forms of contraception. For example, adolescents who have a history of risk factors for thromboembolic disorders should be advised by their physicians that use of oral contraceptives may increase their risk of pulmonary embolism and stroke.[9] A full discussion of alternatives, including barrier contraceptive methods such as the diaphragm and condom, must include their higher failure rates. The physician would be precluded under the AFLA from accurately responding to questions from the patient on the relative risks of using various methods of birth control with abortion as a back-up if the method of choice fails.[10]

The Act likewise prohibits counselors from informing teenagers impregnated during a rape or as a result of parental incest of the option to abort a pregnancy. This prohibition applies even if the counselor believes that carrying a pregnancy

9 *See* Lavery & Sanfilippo, *Pediatric and Adolescent Obstetrics and Gynecology* 238-39 (1985).

10 In fact, a physician or counselor could not accurately describe mortality risks for various methods for avoiding the birth of a child, since abortion is one of those methods. The physician would be prohibited from communicating the view that use of barrier methods with the back-up of an early abortion is the safest method of contraception. *See* Tietze, Bongaarts & Schearer, *Mortality Associated with the Control of Fertility*, 8 Family Planning Perspectives (1976); The Alan Guttmacher Institute, *Making Choices—Evaluating the Health Risks and Benefits of Birth Control Methods* (1983) [hereinafter *Making Choices*].

to term would be traumatic for the adolescent and cause her lasting psychological damage.[11]

The Act interferes with pregnant adolescents' constitutional rights by requiring physicians and other health care professionals to deviate from accepted medical and psychological standards. The ethical and professional guidelines of the American Public Health Association, the American Medical Association, the American Psychological Association, and Planned Parenthood Federation of America mandate the accurate and complete communication of treatment alternatives, including information to a pregnant woman about abortion.[12] Health

11 Section 300z-10(a) does allow recipients of funds to make referrals for abortion counseling, but only if the adolescent *and both* parents or the guardian of such adolescent request it. A blanket provision requiring the consent of parent or guardian as a condition for access by a minor to an abortion has been held unconstitutional by this Court. *Akron*, 462 U.S. at 440; *Bellotti v. Baird*, 443 U.S. 622, 642-44 (1979) [hereinafter *Bellotti II*]. The same principles that prohibit governments from placing an absolute third-party veto in the way of a minor's obtaining an abortion should prohibit government's granting parents an absolute veto on a minor's decision to obtain counseling for an abortion. The practical effect of requiring parental consent for abortion referral is that a mature minor who seeks an abortion may not be able to obtain one. The Act's failure to take a more individualized approach in assessing the competency and maturity of minors violates the constitutional right of privacy held by mature minors. *Bellotti II* at 643-44 and n.23. Section 300z-10 inflicts even greater harm on those minors whose health is endangered by pregnancy. It ensures that these adolescents will never even learn of the option to abort.

12 The APHA has issued guidelines stating:

> education about abortion procedures and services should be the responsibility of all health agencies and professionals concerned with the care of women. . . . Individuals contemplating abortion should be encouraged to seek information and counseling from the best available source. Educational literature on abortion should be easily obtained. . . . The medical professional has an obligation to establish referral relationships for the provision of abortion as with any other specialized medical services.

APHA Recommended Program Guide for Abortion Services (Revised 1979), 70 Am. J. Public Health 652, 653 (1980). *See also* American College of

care providers who fail to adhere to the principles of their professional organizations may risk professional censure.[13] Moreover, failure by physicians to achieve informed consent through full disclosure of relevant information and options is a form of medical malpractice, subject to state law sanctions governing medical negligence.[14]

Obstetricians and Gynecologists, *Standards for Obstetric-Gynecologic Services* (1985) ("In the event of an unwanted pregnancy, the physician should counsel the patient about her options of continuing the pregnancy to term and offering the infant for legal adoption, or aborting the pregnancy."); American Academy of Pediatrics, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920, 921 (1979) (all options, including abortion, should be explored with pregnant teenagers); American Psychological Association, *Ethical Principles of Psychologists*, 36 Am. Psychologist 580, 633-38 (1981) (Resolution that termination of pregnancy be considered a civil right of the pregnant woman"); Planned Parenthood Federation of America, *Medical Standards and Guidelines* (1987); American Medical Association, *Current Opinions of the Judicial Council of the American Medical Association* (1984) (Sections 8.04, 8.07, 8.11); American Psychiatric Association, *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry* (1981). The APHA guidelines stress that it is essential to provide information about risks and alternatives to a pregnant woman when she seeks health care because failure to do so may delay her in obtaining abortion information and referral. For each week of delay, the risk of complications after a legal abortion increases 20%; the risk of death increases approximately 50%. 70 Am. J. Public Health 654 (1980).

13 Current Opinions of the Judicial Council of the American Medical Association (1984) (physicians may be suspended or expelled from the AMA for violation of ethical standards such as failure to follow informed consent principles).

14 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship* 16 (1982). Failure to inform potential parents of the risk of genetic disability and the option of abortion is a form of medical malpractice. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983); *Berman v. Allan*, 404 A.2d 8 (N.J. 1979), *overruled on other grounds*, *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984); *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807 (1978). Adolescents are capable of informed consent—they are, on the average, indistinguishable from adults in their ability to understand and reason about health care alternatives, including whether or not to terminate a pregnancy. Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 Child Development 1589 (1982). Melton & Pliner, *Adolescent Abortion* in Adolescent Abortion 18-19 (Melton, ed. 1986).

2. The Distorted Counseling Required by the AFLA Interferes With An Adolescent's Right to Make Reproductive Choices.

The AFLA strikes at the heart of the right announced in *Roe v. Wade*, 410 U.S. 113 (1973), and reaffirmed in *Akron* and *Thornburgh*: the right to be free from unwarranted state interference in the process of deciding, in consultation with experts, whether or not to bear a child. By requiring physicians and health professionals in funded programs to withhold relevant health information from pregnant adolescents, the AFLA misleads adolescents and prevents them from making an informed choice between childbirth and abortion. By disseminating information on the benefits of adoption, while barring access to data on abortion, the AFLA renders an adolescent in an AFLA program less capable of making an independent reproductive choice than she would be if the program did not exist. Thus, the AFLA infringes on the due process right of women to make a free and informed choice between abortion and childbirth.

B. The Government Cannot Demonstrate that the AFLA Serves Any Interest Sufficient To Justify Its Interference With A Fundamental Right.

This Court has held that the state's interest in protecting adolescents from an *uninformed*, immature choice will justify increased regulation of a minor's access to abortion. *Bellotti II*, 443 U.S. at 635 (1979). Not only does the AFLA not serve this interest, it actually undermines it. By censoring informa-

tion on abortion, even to those teenagers with life-threatening pregnancies, and encouraging childbirth in every instance, the AFLA can hardly be said to protect minors from their immaturity. Rather, by disseminating misinformation, the Act exploits the vulnerability of adolescents.

Nor can the government justify the abortion and adoption provisions of the AFLA on the grounds that they protect physical and psychological health. Such a claim lacks any empirical foundation for three reasons: adolescent childbirth presents more health risks than abortion; the children born to adolescents experience higher rates of physical and psychological problems; and unwanted childbirth limits the career aspirations of adolescents.

In terms of risks to life and health, the abortion procedure is safer than continued pregnancy and childbirth. At eight weeks of gestation or earlier, the risk of death from abortion is about 20 times lower than that of childbirth, and at no point in pregnancy is abortion more dangerous than childbirth.[15] Finally, abortion is rarely followed by significant medical sequelae.[16]

Teenage mothers, particularly younger ones, are, however, at particular risk from pregnancy and childbirth.[17] Adolescent

15 *See* LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J. Am. Medical Assoc. 188, 191 (1982); Cates, Smith, Rochat & Grimes, *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J. Am. Medical. Assoc. 192, 195-96 (1982).

16 Contrary to the information about abortion provided by some AFL grantees, JA 350, 425, 589, researchers have demonstrated that abortions cause no negative effects on subsequent pregnancies in the United States. Chung, Smith, Steinhoff and Mi, *Induced Abortion and Spontaneous Fetal Loss in Subsequent Pregnancies*, 72 Am. J. Public Health, 548, 551 (1982), or worldwide, *see* Hogue, Cates and Tietze, *The Effects of Induced Abortion on Subsequent Reproduction*, 4 Epidemiological Reviews 66, 88-89 (1982); *see also* Tietze & Henshaw, *Induced Abortions: A World Review 1986* at 97-105 (6th ed. 1986) (examining complications and sequelae from induced abortions).

17 National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing, Vol. I* 123-25 (1987).

girls experience 2½ times greater risk of death from continued pregnancy or childbirth than adult women, and also much higher rates of major health complications.[18] For example, women younger than age fifteen are 15% more likely to suffer from toxemia, 92% more likely to develop anemia, and 23% more likely to suffer complications from a premature delivery than are women aged twenty to twenty-four.[19]

In addition to the physiological risks childbirth may entail, carrying a child to term and then giving it up for adoption can be psychologically damaging for the mother. Four principal studies of women who have surrendered their infants for adoption uniformly conclude that women who relinquish their children for adoption are exposed to serious social and psychological harm.[20] Among the problems noted by these research studies are social rejection and ostracism, obsessive fear of future infertility, varying degrees of sexual dysfunction and marital problems.

In contrast, abortion has far fewer negative psychological consequences. Studies show that one of the most frequent emotional responses to the abortion procedure is relief.[21]

18 *See* Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 29 (1981) [hereinafter *Teenage Pregnancy*]; Cates, Schultz & Grimes, *The Risks Associated With Teenage Abortion*, 309 New Eng. J. Medicine 621, 622 (1983).

19 *Teenage Pregnancy* at 29.

20 *See* Burnell and Norfleet, *Women Who Placed Their Infant for Adoption: A Pilot Study*, 1 Patient Counseling Health Education 169 (1979); Rynearso, *Relinquishment and Its Maternal Complications: A Preliminary Study*, 139 Am. J. Psychiatry 338 (1982); Deykin, Campbell and Patti, *The Post-Adoption Experience of Surrendering Parents*, 54 Am. J. Orthopsychiatry 271 (1984); Winkler & Van Keppel, *Relinquishing Mothers in Adoption*, 3 Institute of Family Studies Monograph 1-2 (1984).

21 *See* Freeman, *Influence of Personality Attributes on Abortion Experiences*, 47 Am. J. Orthopsychiatry 503, 504 (1977); National Research Council, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* at 195; Adler & Dolcini, *Psychological Issues and Abortion for Adolescents*, in Adolescent Abortion: Psychological & Legal Issues 84 (Melton, ed. 1986) (Report of the Interdivisional Committee on Adolescent Abortion, American Psychological Association) [hereinafter *APA Report*].

Severe psychological after-effects rarely occur, and other sequelae, such as regret, depression or guilt, "are mild and diminish rapidly over time and general functioning is not adversely affected," Adler and Dolcini, *APA Report* at 84. In addition, adverse psychological after-effects such as depression are more common for childbirth than for abortion.[22]

The children of teenage mothers are also adversely affected. They are twice as likely to die in infancy as the children of women in their twenties and they are more likely to be premature or of low birth weight.[23] Low birth weight is itself a major cause of infant mortality, serious illness, birth injury, mental retardation, and other neurological defects.[24] The children of teenage mothers also suffer educational disadvantage, tend to have lower IQ and achievement scores, and are more likely to repeat at least one grade.[25]

In addition, studies show that children born to teenage mothers who have been denied permission to abort manifest

22 *See* Cates, *Adolescent Abortions in the United States*, 1 Journal Adolescent Health Care 18, 22 (1980); Maracek, *Consequences of Adolescent Childbearing and Abortion*, in *APA Report* at 110-12 (showing that severe emotional consequences rarely, if ever, occur after abortion and that there is evidence that suggests positive changes occur in some cases); Koenig & Zelnik, *Repeat Pregnancies Among Metropolitan-Area Teenagers: 1971-1979*, 14 Family Planning Perspectives 341 (1982) (Unmarried teenagers whose first pregnancy ended in abortion were only half as likely to become pregnant a second time within 24 months as those unmarried teenagers whose first pregnancy resulted in a live birth).

23 *See Teenage Pregnancy* at 29. Pregnant adolescents are less likely to receive prenatal care than older women. Even when they receive care, however, their infants are at increased risk of adverse outcomes. Leppert, Namerow & Barker, *Pregnancy Outcomes Among Adolescent and Older Women Receiving Comprehensive Prenatal Care*, 7 J. Adolescent Health Care 112 (1986).

24 *See Substantially Higher Morbidity and Mortality Rates Found Among Infants Born to Adolescent Mothers*, 16 Family Planning Perspective, 91-92 (1984).

25 *See* Baldwin and Cane, *The Children of Teenage Parents*, 12 Family Planning Perspectives 34, 37 (1980).

particular problems in adjustment, mental and physical capacity, and in the mother-child relationship.[26]

Nor can the government justify the AFLA's prohibition on abortion counseling on the grounds that it promotes the social welfare of minors. It is widely recognized that an ill-informed decision on childbirth may have drastic adverse economic and social consequences for pregnant teenagers, particularly those low-income youths who are targeted by the Act. The Findings of the AFLA itself take note of the adverse effects of childbirth for teenagers. 42 U.S.C. § 300z(a)(5). For example, mothers who give birth before age eighteen are only half as likely to graduate from high school as those who postpone childbearing until after age twenty and they are four to five times less likely to finish college.[27] Families headed by teenage mothers are seven times more likely than others to be poor, and the younger the mother, the lower the family income.[28]

The distorted counseling mandated by the Act is particularly harmful for low-income teenagers and their parents because they are least likely to be fully informed of the options available to pregnant teenagers and to have access to alternative, unbiased, comprehensive health-care programs. Given the

26 David and Matejcek, *Children Born to Women Denied Abortion: An Update*, 13 Family Planning Perspectives, 32, 33 (1981); Caplan, *The Disturbance of the Mother-Child Relationship by Unsuccessful Attempts at Abortion*, 3[illegible] Mental Hygiene 67, 77 (1954); Hook, *Refused Abortion: A Follow-up Study of 249 Women Whose Applications Were Refused by the National Board of Health in Sweden*, 42 Acta Psychiatrica Scandinavica 71-88 (1966).

27 *See* Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 Family Planning Perspectives 199, 203-04 (1978); *see also* Moore & Waite, *Early Childbearing and Educational Attainment*, 9 Family Planning Perspectives, 220, 222-23 (1977); Mott & Marsiglio, *Early Childbearing and Completion of High School* 17 Family Planning Perspectives 234, 235-36 (1985).

28 *See Teenage Pregnancy* at 33. Marecek, *APA Report* at 98-108 (long term effects of carrying to term can include negative impact on educational and occupational attainment, economic status, marital experiences, and subsequent childbearing).

plethora of harms associated with compelling a teenager to carry a pregnancy to term, the government can assert no interest that justifies its invasion of an adolescent's right to decide whether or not to terminate her pregnancy.

II. THE AFLA DISCRIMINATES AMONG RELIGIONS BY REQUIRING THE INVOLVEMENT OF RELIGIOUS ORGANIZATIONS THAT DO NOT ADVOCATE, PROMOTE OR ENCOURAGE ABORTION.

A. Because the AFLA Favors Certain Denominations It Must Be Subject to Strict Scrutiny.

Religious denominations in the United States are sharply divided over the question of abortion. JA 601-605. The Roman Catholic Church teaches that personhood begins at the moment of conception and, therefore, from its perspective, abortion is murder. JA 591. Judaism and most mainline Protestant groups reject the notion of fetus as person on religious grounds. JA 592. Under Jewish law, for example, abortion is an option that may be religiously compelled where the mental or physical health of the pregnant woman is threatened. JA 600. Other religious denominations teach that the requisite moral choices involve consideration of factual information about the consequences of alternative courses of action to oneself, one's family, and society. Accordingly, many Protestant denominations, such as the Methodists, hold that the abortion decision must be a matter of conscience for the woman, requiring consideration of available options. JA 602, 606. Other denominations, such as the General Assembly of the Presbyterian Church, support the availability of abortion. The Southern Baptist Convention has officially sanctioned teaching materials discussing abortion. JA 597.

This plurality of religious views on the morality of abortion is protected by the First Amendment's provisions regarding the establishment and free exercise of religion. Nevertheless, Congress has attempted to establish some religions in passing a statute that mandates the involvement of religious organizations in the presentation of information on adolescent sexuality and pregnancy and simultaneously prohibits presentation of information about abortion. Under the AFLA an abortion "test" is applied to religious applicants and also to religious organizations that are involved in the projects administered by other organizations. Only religious organizations which do not "advocate, promote or encourage" abortion may be funded under the AFLA or involved in programs administered by other grantees.

The inevitable consequence of the conjunction of the abortion prohibition with the involvement of religious organizations is the favoring of some religions over others. Numerous religions are subject to impermissible discrimination. For example, Southern Baptist Churches providing sex education with the officially sanctioned text of the Southern Baptist Convention, *Growing Up With Sex*, are ineligible for AFLA funding because the book presents information on pregnancy options, including abortion. Even though *Growing Up With Sex* advocates premarital sexual abstinence, provides factual information on sexual maturation, and supports the development of responsible sexual attitudes, its provision of abortion information disqualifies Southern Baptist Churches using it from AFLA funding. JA 597.[29]

In contrast, groups with anti-abortion religious beliefs are benefitted by the AFLA. Family of the Americas Foundation (FAF), for example, received $1,239,250 to provide prevention programs. JA 791. These programs relied on unsound contraceptive methods, taught that abortion was the "premeditated killing of an unborn baby in the mother's womb," and pre-

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29 Other religious leaders perceive their denominational beliefs denigrated by the government's exclusive funding of religious organizations that hold religious views on the issue of abortion antithetical to their denomination's views. See testimony of Reverend Vaughan, Methodist minister of Beverly Hills Church, JA 54; Reverend Buxton, Minister of Floris Methodist Church, JA 56; Rabbi Luxenburg, member and representative for the American Jewish Congress, JA 58-61.

sented only negative and biased information about abortion. JA 587.[30]

Similarly, St. Margaret's Hospital, a Catholic hospital run by the Archdiocese of Boston, received $1,879,118 for Combination Care and Prevention projects. At St. Margaret's adolescents were taught biased and misleading information on family planning and abortion designed to discourage the use of contraceptives and abortion in accordance with Catholic doctrine and in opposition to the health needs of its adolescent patients. JA 525-539.

When the Court is presented with an establishment clause challenge to a law "granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson v. Valente*, 456 U.S. 228, 246 (1982).[31] Strict scrutiny applies

30 FAF describes itself as "a Christian Alternative" and its Executive Director reports regularly to the head of the Catholic Church. JA 381, 581, 627, 629. It teaches the ineffective Billings Ovulation method of family planning to those who are striving "to make themselves better instruments of God's plan." FAF encourages the Billings method because "it helps realize that the family is an integral part of the church." JA 379, 385. The Billings method relies on self-detection of changes in cervical mucus throughout the menstrual cycle, permitting abstinence during fertile periods. The Billings method has a high failure rate of approximately 24% for all users. Alan Guttmacher Institute, *Making Choices* at 8, 28. It is particularly unsuited for adolescents and the many women who have irregular or anovulatory periods. *Id.* at 8. FAF also taught adolescents that condoms are "a pollution of their own bodies," JA 381, and that they were "messy, unnatural," caused "irritations," and were "never" recommended. JA 396. Consequently, FAF education blunts, for religious reasons, the impact of the Attorney General's recommendation that use of condoms can provide protection from AIDS. *Surgeon General's Report on Acquired Immune Deficiency Syndrome* 17 (1987). These are examples of how AFLA promotion of religious dogma on abortion has led to government support of religiously-motivated misinformation on family planning and sexually transmitted disease prophylaxis.

31 Statutes, to be upheld under the establishment clause, must in addition to not discriminating among religions, pass the three-part test developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, a government action survives establishment clause scrutiny only if it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits

whether or not discrimination appears on the face of the statute. *Gillette v. United States*, 401 U.S. 437, 452 (1971).[32] In *Larson v. Valente*, for example, the Court subjected to strict scrutiny a Minnesota statute that required reports only from religious organizations that received most of their contributions from nonmembers even though the statute did not express a denominational preference on its face. Like the statute found unconstitutional in *Larson*, the AFLA makes "explicit and deliberate distinctions between different religious organizations." 456 U.S. at 247 n.23. It effectively distinguishes between denominations which espouse an absolute prohibition on abortion as a part of their religious dogma on the one hand and denominations which espouse a broader view of moral options available to pregnant adolescents on the other hand.

B. The AFLA Is Not Narrowly Tailored to Further a Compelling Government Interest.

Even if government interests in preventing the adverse health, social, and economic consequences of adolescent pregnancy and childbirth were sufficiently compelling to justify discrimination among religions, the AFLA does not in any way promote those interests. The inclusion of religious denominations that do not advocate, promote or encourage abortion

religion, and (3) does not foster excessive government entanglement with religion. As appellees argue, and as the District Court found below, the AFLA also fails the effect and entanglement aspects of the *Lemon* test.

32 The AFLA cannot escape strict scrutiny under *Gillette* because it applies to organizations and not to individuals. *Gillette* involved an Establishment Clause challenge to a statute that accorded conscientious objector status to individuals who, like Quakers, conscientiously oppose all wars but not to individuals who, like Catholics, oppose only unjust wars. There the statute applied equally to individuals, and did not treat religions or religious organizations differently. In contrast, the AFLA explicitly requires applicants to involve *religious organizations*. Accordingly, the government must distinguish between the moral principles and theological positions of various sectarian organizations.

simply does not further the interests that the AFLA purportedly serves.

For the reasons documented in Point I, *supra*, the AFLA's prohibition on abortion counseling and referral has a devastating effect on the health and well-being of the vulnerable and underserved adolescents targeted by the Act. Denial of the constitutional right to make informed reproductive decisions with a concomitant rise in the risk of adolescent morbidity and mortality is a consequence of the Act. Furthermore, adolescents may be likely to reject the health information proferred.

One of the dangers of government endorsement or disapproval of religion is the creation of an outsider class:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *See also Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). To the extent that government support of religious organizations that are opposed to abortion discourages other charitable groups and nonreligious adolescents from participating in reproductive health and education programs, the AFLA is counterproductive. By making certain religious organizations and adolescents feel like outsiders, the AFLA has increased the chance that opportunities to participate in valuable health programs will be rejected.

Public health research on the effectiveness of various approaches to the problems of adolescent pregnancy has not demonstrated benefit to programs administered by religious organizations or involving religions that have strictures against abortion and contraception. Given the overwhelming problems of teenage pregnancy, a statute that discriminates against religious organizations who offer unbiased information on reproductive options is not closely tailored to further any compelling government interest and must be invalidated.

III. THE AFLA'S RESTRICTION ON ADVOCATING, PROMOTING OR ENCOURAGING ABORTION DISCRIMINATES ON THE BASIS OF VIEWPOINT IN VIOLATION OF THE FIRST AMENDMENT.

Once the government has opened a forum for discussion, it must maintain viewpoint neutrality and ensure that the forum be nondiscriminatory. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985).[33] In *Cornelius*, the Court upheld an Executive Order banning access by legal defense and political advocacy organizations to a non-public forum only because the ban was viewpoint neutral. The Court noted, however, that even a facially neutral regulation would fall if it were "in reality a facade for viewpoint-based discrimination." 473 U.S. at 811. Thus, if a facially neutral regulation can be unconstitutional, the explicitly discriminatory prohibition on abortion information in the Act is clearly unconstitutional.

Moreover, principles of viewpoint neutrality dictate that public funds may not be allocated so as to suppress "dangerous" ideas while subsidizing "approved" ideas. *FCC v. League of Women Voters*, 468 U.S. 364 (1984). There, the Court struck down a ban on editorializing by publicly-funded radio stations

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33 It is irrelevant that the forum here is not the traditional one of public streets, sidewalks and parks. This Court has held in *Cornelius* that:

> In addition to traditional public fora, a public forum may be created by government designation of a place or channel of communication for the use by the public at large for assembly and speech, for use by certain speakers, *or for the discussion of certain subjects*.

473 U.S. at 802 (emphasis added). Here the government has expressly created a public forum encouraging public communication, especially between parents and adolescents, and among the schools, youth agencies, charitable organizations, and health providers who serve them. An announced purpose of the AFLA is to:

> "encourage and provide for the dissemination of results, findings, and information from programs and research projects relating to adolescent premarital sexual relations, pregnancy, and parenthood."

42 U.S.C. § 300z(b)(6). Consequently the government has opened a channel for public communication under the AFLA.

on First Amendment grounds because the ban was "motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest." *Id.* at 383-84, *quoting Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring). *See also Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (restriction prohibiting receipt of tax-deductible contributions by non-profit lobbying organizations upheld only because of its viewpoint neutrality); *Arkansas Writers' Project, Inc. v. Rugland*, ____ U.S. ____, 107 S. Ct. 1722 (1987) (public regulation of publications on the basis of their content violates the First Amendment).[34]

Here, the AFLA requires the Secretary of Health and Human Services to ascertain whether programs conform with the limitation on providing abortion information and to withhold their funds if they do not. 42 U.S.C. § 300z-10(b). By such punitive measures the statute compels what the First Amendment forbids by granting government the power to restrict expression "because of its subject matter, or its content." *Police Department v. Mosley*, 408 U.S. 92, 95 (1972).

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34 More than a decade ago the Supreme Court held that a statute prohibiting anyone to "encourage or prompt the procuring of abortion . . ." violated the First Amendment, even as applied to commercial advertising. *Bigelow v. Virginia*, 421 U.S. 809 (1975). Later, counseling about abortion was held to be constitutionally protected speech. *See, e.g., Planned Parenthood Association v. Kempiners*, 568 F. Supp. 1490, 1495 (N.D. Ill. 1983). *Planned Parenthood v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd without opinion sub nom., Planned Parenthood v. Babbitt*, 107 S. Ct. 391 (1986), is inapposite in a First Amendment context. There the court, relying on *Maher v. Roe*, 432 U.S. 464 (1977), which had been decided on Fourteenth Amendment equal protection grounds, permitted Arizona to refuse to *fund* abortion-related activities by non-governmental organizations. *Maher* has no application in the First Amendment area, 432 U.S. at 475 n.8. Here the government has forbidden grantees to freely express their views on abortion, even if grantees use their own funds to do so. JA 93. Thus the government has impermissibly conditioned the receipt of a government benefit on the sacrifice of the constitutional right to free expression. *Sherbert v. Verner*, 374 U.S. 398 (1963).

The government need not remove those obstacles not of its own creation in the way of a person's right to free speech. However, having opened a channel for speech about adolescent sexuality and pregnancy, it may not block the dissemination of medical information about abortion. *See Regan v. Taxation With Representation*, 461 U.S. at 549-50. No compelling government interest can be offered in support of a prohibition that distorts the medical information available to adolescents to the detriment of their health and well-being.

Conclusion

Amici urge that the District Court's judgment be affirmed as to its finding that the AFLA is unconstitutional insofar as it involves religious organizations and reversed as to its upholding the constitutionality of the Act as it applies to all other applicants and grantees.

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